1909-042 Chancery Causes: KeoKee Coal & Coke Co] vs. W. S. Ambergy &c
Lee Co.

- Rowe, Johnston, Bunn, Judd, Johnson, Hornick

CA-Contract Dispute
T-Property
Transportation

To the Hon. H. A. W. Skeen, Judge of the Circuit Court for Lee County, Virginia:

Your orator, the Keokee Coal & Coke Company, a corporation, showeth unto your honor, that a suit is now pending in your honor's circuit court for Lee County, on the law side thereof against your orator by one W. S. Ambergy and one A. D. Rowe, the same being an action of assumsit to recover an alleged indebtedness due to the said defendants by your orator of $5334.00. The said action of assumsit is a new cause, the declaration having been filed January 16th, 1908, and process thereon executed on your orator by service on an agent on February 14th, 1908. The present term of the Lee Circuit Court is the first term at which the said case has matured.

Your orator says, that the said action is based on a certain letter written by your orator to the said plaintiffs, dated Nov. 28th, 1907, and dated Keokee, Lee County, Virginia. Which letter is as follows:

"We herewith accept your offer to clear right of way for connecting line to Blackmountain Railway where ever necessary for $6.00 per one hundred sq. ft. For all railroad ties from this material we shall pay you 20cts. and for all mining ties one-half amount paid Stirgil."

This letter was signed by your orator by their superintendent and was intended to be in confirmation of a verbal agreement that day, or shortly prior thereto made, between your orator and said plaintiffs, but the written contract entered into between your orator and the said plaintiffs was that said work of clearing should be at the price of $6.00 per one hundred feet square instead of one hundred square feet. A simple mistake occuring when your orator reduced the said agreement to writing, and the mistake was not discovered by your orator until after the work of clearing had been done, or nearly so. The work referred to was clearing off a right of way for the building of a branch line of railroad, and $6.00 per one hundred feet square was a large price for the work, while

your honor will see $6.00 per one hundred square feet would be ten times this amount. The said plaintiffs accepted this contract on the basis of $6.00 per one hundred feet square, and did the said work and were paid for the same in full by your orator on that basis, and they so treated and considered the agreement until the time the work was completed or about completed when they discovered the mistake in the letter, and then began to demand of your orator payment on the basis of $6.00 per one hundred square feet, which your orator declined to pay, whereupon the aforesaid action at law was brought.

The said plaintiffs in the action at law are intending to use and will unless restrained, use the aforesaid letter as evidence against your orator in the said action at law, and your orator is uncertain as to the rights of the court of law to correct this mistake, but comes imto a court of equity where such matters are certainly cognizable for relief.

Wherefore being without remedy save in a court of equity, the prayer of your orator is, that W. S. Ambergy and A. B. Rowe be made parties defendants to this bill, and be required to answer the same, but answer under oath is waived, that an injunction issue restraining the parties in their action at law until this cause can be heard. That upon a hearing the defendants be required to deliver up the said letter to have the same corrected, and that the same be made to read one hundre feet square instead of one hundre square feet on the part hereinbefore set out, and that the said defendants be prohibited from recovering from your orator any portion of the amount alleged to be due, if any should be due, which your orator denies, in excess of the contract price of $6.00 per one hundred feet square for certain work; and for such other and further and general relief as to equity may seem meet, and the nature of its casue may require. Your orator will ever pray &c.

Irwin & Morrison
P. C.

Virginia, Lee County, to-wit:

I, H. C. T. Ewing, Clerk of the Circuit Court for Lee County, Virginia, do certify that R. T. Irvine this day personally appeared before me and made oath that he is attorney and agent for the Keokee coal and coke company, plaintiffs in the foregoing bill of injunction, and that the statements made in the said bill are true as he verily believes.

Given under my hand this the 5th day of May, 1908.

H. C. T. Ewing Clerk.

Keokee Coal & Coke Co
vs
Bill in Chy.
W. S. Anchergy et als

Filed May 5-1908.
H. C. P. Ewing,
Clerk.

Plffs. costs:
Clerk $3.85

Defts costs:
Clerk 15¢

LEE CIRCUIT COURT.

To the Honorable H. A. W. Skeen, Judge of the Circuit Court of Lee County, Virginia.

The joint demurrer and answer of W. S. Amburgey and A. B. Rowe to a bill exhibited against them, in this Honorable Court, by the Keokee Coal & Coke Company, a corporation.

Defendants say that the said bill is not sufficient in law to call upon them to answer in this Honorable Court, and, therefore, they demur to the same, and pray judgment of this Honorable Court; and, for cause of demurrer, they say:

That no sufficient grounds for maintaining the said bill is alleged, and that said alleged mistake averred in said bill is not such a mistake as a court of chancery can correct; and,

Not waiving the said demurrer, but relying and insisting thereon, they say that it is true that they have instituted in the Circuit Court of Lee County an action of assump sit by which they seek to recover from the said Keokee Coal & Coke Company the sum of $5,334.00 for labor rendered by them for said defendant, in the cause at law, at its special instance and request; and, it is further true that the contract under which they did and performed the said work is a written contract, executed on the 28th day of March, 1907, (and not the 28th day of November, as alleged in the said bill); and it is further true that they propose to use the said written contract as evidence in their behalf in the action of assumpsit aforesaid, now pending in this Honorable Court.

It is further true that the said contract was made with Mr. H. E. Judd, Superintendent of the said defendant company; that it was reduced to writing by him, and delivered to your

respondents on the day it bears date, or the day thereafter. It is not true that this written contract was intended to be a confirmation of a verbal agreement that day or shortly prior thereto made between the said Judd and your respondents; but, on the contrary, the whole facts and circumstances of that contract are as follows:

Your respondents were manufacturing ties for thes aid Keokee Coal and Coke Company, and on a certain date went to the office of the Superintendent of said defendant company to make some enquiries about the work in which they were then engaged, and while there, Mr Judd asked them if they would not take a job of clearing off the right of way over which the said company desired to build a branch or spur line of railroad to intersect with the Black Mountain Railway Company's road, which was then being constructed in and through the Crab Orchard, in Lee County, Virginia, and proposed to your respondents, if they would clear off the same, under the directions and to the satisfaction of the said Keokee Coal and Coke Company, or its superintendent, that he would pay them the sum of six dollars for every one hundred square feet of right of way so cleared. Respondent, Amburgey, particularly called the attention of the said Judd to the fact that there was a very wide difference between a hundred square feet of land and a piece of land one hundred feet square, and asked him if he meant every one hundred square feet, to which he responded that he knew there was a difference, and went to his book and looked at it, and then said that he meant to pay them six dollars

for every one hundred square feet so cleared. Respondents asked him to reduce his proposition to writing, and told him that they would go and look over the land to be cleared, which they did, and that evening or the next day, respondents went back to the office, when he delivered to them the writing aforesaid, a copy of which is contained in the plaintiff's bill. Respondents say that there was no mistake in the making of the said contract, or in the terms of it. Respondents say that it is not true that they accepted this contract on the basis of six dollars per one hundred feet square, and did the said work under any such contract; but, on the contrary, they accepted the same at the contract price, contained in the said agreement, of six dollars for every one hundred square feet; nor, is it true that they considered the agreement to be at six dollars per one hundred feet square until said work was completed, or about completed; but, on the contrary, they always relied upon it, in accordance with the terms contained in the said writing.

They deny that the price of six dollars per one hundred feet square was a large price or any unreasonable price at all for said work; and they would not, for one moment, have considered that price, or undertaken to have performed that work.

Respondents deny that they were ever paid in full for the said work. They further deny that they have ever been paid one single cent for said work, but the whole and entire amount due for said work is still due and owing to your respondents.

And, now, having answered the said bill as fully as they are advised it is material for them to answer, and praying that said injunction be not granted, and that they be hence dismissed with their costs.

Kilgore & Bandy
C T Duncan } p.d.

VIRGINIA, LEE COUNTY, to-wit:

This day, W. S. Amburgey, personally appeared before me, Geo. P. Cridlin, a commissioner in chancery for the Circuit Court of Lee County, and made oath that the facts stated in the foregoing answer are true as he verily believes.

Given under my hand, this 5th day of May, 1907.

Geo. P. Cridlin
Commissioner in Chancery.

Filed May 5, 1908.
J. C. D. Ewing,
Clerk.

Kanawha Coal & Coke Co. } Final order
v. } Chancery
W. S. Lansberry et al }

It appearing that the matters in controversy herein have been fully settled it is ordered that this cause be dismissed & stricken from the docket.

Kerr Glass Co.

vs. Final order

W. S. Amberg et al

Entered
May 4-09
H A W Shum

Entered in O.B.
#5, page 472

Keokla Coal & Coke Co (a corporation) Complt

vs

Order in Chancery

W S Armburgey & A.B. Rowe Defts

This day come the plaintiff and defendants by their attorneys and by agreement of the plaintiff & defendant the plaintiff filed its bill in chancery in open court and thereupon the defendants entered their appearance to said bill and by agreement the defendants filed their demurrer and answer to said bill and the plaintiff joined in said demurrer and replyed generally to said answers and the court takes time to consider said demurrers and this cause is continued

Kentucky Coal & Coke Co

vs

Order

W. H. Goodloe and

A. B. Rowe

Entered in C. O. B.

8, page 373-

Enter

H. A. W. Sillman Judge

May 7th 1908

H3518Jn3

TO W. S. ALBURGEY and A. B. ROWE

You are hereby notified that the undersigned will, on the 2nd day of September, 1908, at the law offices of Irvine & Morison, in the town of Big Stone Gap, Wise County, Virginia, between the hours of 9 a. m. and 6 p. m., proceed to take the depositions of H. L. Judd, and others, to be read as evidence in its behalf in a certain suit in chancery now pending in the Circuit Court of Lee County, Virginia, wherein it is complainant and you are defendants.

If, for any reason, the taking of said depositions be not commenced on the aforesaid date, or if commenced, are not concluded, then the taking of the same will be adjourned from day to day at the same time and place hereinbefore mentioned until the same are completed.

This the 24th day of August, 1908.

KECKEE COAL & COKE CO MANY

Irvine & Morison
Counsel.

Executed by delivering a true copy of the within notice to A. R. Kilgore, in Norton, Wise County, Virginia, on the 26 day of August, 1908.

This the 26 day of August, 1908.

P. D. Hurt
Sergeant of Norton Va

Subscribed and sworn to before me this the 26 day of August, 1908.

Geo Jenkins
Notary Public.

My Commission Expires May 8th 1909

The depositions of F. W. Johnston, J. E. Bunn, H. E. Judd, Charles Johnson and R. Hommel taken before me, James E. Mears, a notary public, in and for the county of Wise, in the state of Virginia, at the law offices of Irvine & Morison, Big Stone Gap, Virginia, on the second day of September, 1908, between the hours of 9 a. m. and 6 p. m., to be read as evidence on behalf of the plaintiff in a certain suit in chancery now pending in the Circuit Court of Lee County, Virginia, wherein the Keokee Coal & Coke Company is plaintiff and W. S. Amburgey and A. B. Rowe are defendants.

Taken pursuant to notice hereinafter annexed.

P R E S E N T

R. T. Irvine,
A. K. Morison, Attorneys for Plaintiff.

No counsel for defendant during the taking of the depositions of F. W. Johnston and J. E. Bunn.

F. W. Johnston, being first duly sworn, deposes and says:

By Mr. Irvine -

Q - Please state your age, occupation and place of residence?

A - Age 43 yrs.; railroad contractor, and residence St. Elmo, Ill.

Q - State whether or not you are the same F. W. Johnston who is a member of the railroad contracting firm now and for some time past operating in this county and in

Lee County, Virginia, under the firm name of Johnston & Grommet Brothers?

A - I am.

Q - State what contracts you have had in Wise and Lee counties, for railroad construction?

A - Had a contract with the Keokee Coal & Coke Company for constructing a part of the grade and bridging between Imboden, Virginia and a part on the Interstate Railroad, between Appalachia and Norton, Virginia. It covered all the work incident to the construction of these lines, except track-laying.

Q - We hand you copy of a contract entered into on the 20th day of December, 1906, between the Keokee Coal & Coke Company and F. W. Johnston, G. J. Grommet, and W. J. Grommet, composing the firm of Johnston & Grommet Brothers, and I will ask you if this is a copy of the contract you had between your firm and the Keokee Coal & Coke Company with reference to the construction of the railroad grade made between you and the said Keokee Coal & Coke Company, referred to in your previous answer?

A - Yes, sir; this is a copy of our contract.

Q - Will you file that copy as an exhibit to your deposition?

A - Yes, sir.

Q - Does this contract cover all necessary construction work between Keokee Junction and the terminus of the branch line or spur at the Keokee Coal & Coke Company's plant?

A - Our contract covers the unfinished grading between Imboden and the Keokee Company's coke ovens, as shown by the contract.

Q - Where are the coke ovens with reference to the main line of the Black Mountain Ry. Co.

A - About 3/4 of a mile from the main line.

Q - Your contract then covered as we understand it this 3/4 of a mile connecting line; is that correct?

A - Yes, sir.

Q - We find in this contract, in prices for work, set out in section 14 thereof, clearing $6.00 per station; please state what is meant by that stipulation,"clearing $6.00 per station?"

A - It means station clearing 100 ft. in length and not to exceed 100 ft. in width.

Q - State what is meant in railroad contract terms by the word "station" in connection with clearing?

A - It usually refers to 100 ft. in length.

Q - And how many feet in width?

A - 100 ft. in width generally, but it does not necessarily have to be 100 ft. wide, but it is not to exceed 100 ft. in width.

Q - State what was the prevailing price for this work along this line of road that you were contracting about; whether or not your contract of $6.00 per station expresses such prevailing price?

A - Yes, sir.

Q - State whether or not $6.00 per 100 ft. square was a reasonable price for this work of clearing?

A - Yes, sir. on the spur track.

Q - What is meant by "clearing" in this connection?

A - Clearing of a railroad right of way is to cut the trees down to a certain height, usually to pile and burn the brush and dispose of the other timber as the engineers of the company require.

Q - Did your firm do the clearing under this contract from the Junction of the Keokee Branch up to the coke ovens?

A - No, sir.

Q - Did you or not do the clearing from the Keokee junction on the Black Mountain Ry. line down to Imboden?

A - All that was unfinished when we came on the work.

Q - What is meant by "grubbing" as set out in your contract?

A - That is wherever grubbing is necessary; any portion of the station that is grubbed which is between the slope stakes of a cut or between the slope stakes of a fill, any portion that is less than 100 ft. that is to be grubbed. This, of course, means grubbing up the stumps and getting them out of the way.

And further this deponent sayeth not.

(See page 27)

F W Johnston

Also the deposition of J. E. Bunn, who being first duly sworn deposes as follows:

By Mr. Irvine:

Q - Please state your age, occupation and place of residence?

A.- Age 53yrs., occupation contractor, residence Big Stone Gap, Va.

Q - State whether or not you have now or recently have had contracts for railroad construction in Wise County, and if so, state what?

A - Yes, sir; I had contract from the Black Mountain division into Keokee and Imboden, in 1907.

Q - State whether or not you are familiar with the ruling prices of clearing the right of way along that line?

A - Yes, sir: I have had a contract on that first mile from Imboden toward Keokee Coal & Coke Company plant. I had first taken the contract under J. E. Oates & Co. and my contract with them was $6.00 for clearing station and $7.50 for grubbing station. That is as far as I personally know. I saw his books and he contracted straight through, over 17 miles, but this was what I was to get for that grubbing and clearing. My son-in-law was book-keeper for J. E. Oates & Co. who had contract for the 17 miles and their books showed $6.00 per station for clearing.

Q - Please state where these 17 miles extended to and from what point?

A - They extended from; I believe it began at the lower end, the connection point at St. Charles and ended at Imboden, at the intersection of the road, Imboden.

Q - State whether or not $6.00 per 100 ft. square was a fair price for clearing along this line.

A - Well, I do not think it was a fair price for the mile I had. On account of the reason it was claimed to be the heaviest mile of timber on the road; but taking the road through it is said to be a fair price.

Q - Are you or not familiar with the work to be done in clearing from the Junction of the Keokee Branch line on the Black Mountain Ry. line up to the Keokee Coke Ovens?

A - No, sir; I am not familiar.

Q - State what is meant by "station" in railroad contracts?

A - It means 100 ft. in length and 100 ft. or less in width.

Q - What was the width of the right of way along your mile?

A - 100 ft.

Q - State whether or not that was the width along the 17 miles referred to by you of the Oates contract?

A - I do not know, sir; I never went over the line or seen any of the plans of it.

Further deponent sayeth not. J E Brown

Also the deposition of H. E. Judd, who being first duly sworn, deposes as follows:

(At this point, the defendant, W. S. Amburgey, appeared with his counsel, John W. Chalkley, who appears specially for the taking of these depositions.)

By Mr. Irvine - Direct Examination.

Q - State your age, occupation and place of residence?

A - Age 30 yrs., residence Keokee, occupation superintendent of Keokee Coal & Coke Company.

Q - Do you know Messrs. Amburgey and Rowe, the defendants in this suit, and if so, how long have you known them?

A - I have known them for about, I expect 18 months; two or three months before the date of that contract.

Q - The contract will be shown to have been dated March 28, 1907.

A - About 18 months, I have known them.

Q - Did you make an arrangement with these parties relative to clearing off the right of way in controversy herein?

A - I did.

Q - Please state the circumstances leading up to the making of this contract?

A - Johnston & Crommet Bros. held contract for this work and were unable to do this piece of clearing and I was requested by the Chief Engineer of the Railroad, Mr. A. N. Bullitt, to let the work for him at the same price or less

than we were paying Johnston & Grommet Bros. I spoke to several parties around the plant and asked them to look at the work and give me a price on the same. Amburgey & Rowe were among those I spoke to. They looked over the work and we talked the matter over in my office regarding price. At the time the matter was talked over in my office there was some slip made in the conversation regarding the area to be cleared; that is, whether it was 100 ft. square or whether it was 100 square feet. Mr. Amburgey mentioned the fact at the time that there was considerable difference between the two areas. At that time, however, I stated, and my understanding was, that the price paid should be per 100 feet square, and it was understood as far as I know between Amburgey and Rowe. After this conversation they looked over the work and decided to take it at the price of $6.00 per 100 ft. square. The confirmation of this agreement was given by me to the stenographer to be signed by me and handed to Messrs. Amburgey or Rowe. There was a mistake made in this contract in the area to be cleared which was not discovered by us until Mr. Amburgey refused to take the payment, which was offered him on the regular pay day of the company after the work was completed.

Objection by Mr. Chalkley.

All of the foregoing answer with reference to verbal conversation between the parties with reference to price and area is objected to because the agreement between the parties was reduced to writing, and the writing is the best evidence.

Q - I hand you what purports to be a carbon copy of a letter which reads as follows:

" Keokee, Lee County, Virginia,

March 28, 1907.

Mr. _____

Keokee, Virginia.

Dear Sir:

We herewith accept your offer to clear right of way for connecting line to Black Mountain Railway, wherever necessary, for $6.00 per 100 sq. ft.

For all railroad ties from this material we shall pay you 20 ¢ and for all mine ties, one-half amount paid Mr. Sturgill.

Yours very truly,

KEOKEE COAL & COKE CO.

_____

Superintendent. "

I will ask you to examine this carbon copy and state whether or not this is a carbon copy of the original letter.

A - It is.

Q - What became of the original letter?

A - Copy of the original was handed to Mr. Amburgey or Rowe, I do not know which, and the carbon copy of same was in our office 30 days ago; I suppose it is still there.

Q - State whether or not this is a correct copy?

A - It is.

Q - Please file same, marked Exhibit 1, to your deposition, and as a part of it.

A - I file same, as requested.

Q - I see no names are given in the heading of this letter as addressee; state why that was?

A - At the time of writing the letter I could not recall

the initials of Mr. Amburgey or Mr. Rowe and asked the stenographer to find these out and fill in the same. This, as I remember, is done on the original copy.

Q - Did you sign the original of this letter?

A - I did.

Q - State when, if you know, the original was delivered to Amburgey and Rowe or either of them?

A - I think it was delivered to them three or four days after the conversation held in my office.

Q - State whether or not before the delivery of that letter they had gone to work on this job?

A Yes, sir; they had.

Q - State, if you can, how you came to write one hundred square feet instead of one hundred feet square in this letter?

A - I do not know whether the mistake was made by me or by the stenographer.

Objection by Mr. Chalkley..

Question and answer objected to because immaterial and irrelevant.

Q - Can you state why you did not detect the mistake at the time you signed the letter.

Objection by Mr. Chalkley.

Objected to because immaterial and irrelevant.

A - The only think I can say is that this point was overlooked on account of the considerable other business on hand at that time.

Q - At the time you made the verbal agreement with Messrs. Amburgey & Rowe, state whether or not you had in your mind the difference between 100 square feet and 100 feet square?

A - I had this difference clearly in mind at the time.

Q - What is the difference?

A - The difference is one hundred times one hundred square feet.

Q - What was the ruling price for such work in railroad clearing along the lines of the railroads then being constructed at and near Keokee?

Objection by Mr. Chalkley.

Question objected to because immaterial.

A - The ruling price on the Black Mountain line between Imboden and Keokee was $6.00 per station.

Q What is meantby station in railroad construction?

A - Station is 100 lineal feet along the center line of road.

Q - What is the width of a station in the matter of clearing?

A - As a general rule the width of right of way is 100 ft.

Objection by Mr. Chalkley.

Question objected to because immaterial and hearsay.

Q - What was the width of the Black Mt. Ry. between Imboden and Keokee?

A - The width of right of way with the exception of one piece near the Keokee Junction upon which there was no clearing was 100 ft.

Q - St te the nature of the clearing involved in this work that was done by Messrs. Amburgey & Rowe?

Objection by Mr. Chalkley.

A - Objected to because immaterial.

A - Most of the clearing was clearing the laurel bushes off, with a few trees to be cut down, none of which were probably more than one foot in diameter. The clearing at this point was not worth more than other parts along the main line of the Black Mountain Railway.

Q - How long were these parties engaged in doing this work, if you know?

A - Objection by Mr. Chalkley?

Objected to because immaterial and irrelevant.

A- As near as I know, about a week or ten days.

Q - What force had they at work at that time?

A - I do not remember exactly, but think the force would average about three men.

Q - State whether or not $6.00 per 100 ft. square for the work done in clearing under this agreement was a fair price?

- Objected to by Mr. Chalkley.

Question objected to because immaterial and irrelevant.

A - In my opinion, it was.

Q - When did you first discover that you had made the mistake in writing this letter?

A - It was first called to my attention by the bookkeeper after Amburgey & Rowe had refused to accept the payment offered them on the basis of $6.00 per 100 feet square.

Q - Was that before or after the completinn of the work?

A - After the completion of the work.

Q - Did you not then examine your letter file with reference to this matter?

A - We did and found the error.

Q - What did you do or say to Messrs. Amburgey & Rowe about it?

A - I told them that we could not consider settlement on the basis they claimed?

Q - What did they say or do?

A - As I remember, they had nothing further to say about it. The next I heard of the matter was when notice was served on me regarding this suit.

Q - State whether or not your company tendered them payment in full for the work done, calculated on the basis, as I understand by you, of $6.00 per hundred feet square?

A - The company did.

Q - How wasthis done?

A - This was made up on the regular pay roll of the company and I think was offered to them on one of the regular pay-days. It was the first time they called for it after the pay-day.

Q - State whether or not the company has kept this money at all times since then for these parties?

A - We had the money in the office for them and have had it since this payment was due.

Q - How was this money kept; in an envelope or otherwise?

A - Generally kept in an envelope in the safe. Sometimes it is paid by check, provided the amounts are not called for for a considerable time after they are due.

Q - In this particular case, do you know how that was?

A - Payment was offered them first by payment in cash. I am not certain of this, however; it might have been by voucher.

Q - As we understand, there was no objection made as to form of payment but as to amount, is that correct?

A - Yes, sir.

Objection by Mr. Chalkley.

Question and answer objected to because hearsay.

Q - State whether or not the company is now and has at all times since been ready, willing and able to pay them what it believes to be a correct amount?

A - Yes, sir.

Cross Examination.

By Mr. Chalkley:

Q - Mr. Judd you had authority, had you not, from the Keokee Coal & Coke Company to make this contract with Amburgey & Rowe?

A - Yes, sir. I had authority from Mr. Bullitt who was Chief Engineer for the Keokee Coal & Coke Company on that work.

Q - As superintendent of the company did you not have general charge of these accounts?

A - Right-of-way accounts?

Q - Yes, sir.

A - I had nothing to do with the Railway construction.accounts at all.

Q - Are they not audited in your office?

A - In the New York office.

Q - In the conversation about this work prior to the making of the contract who were present?

A - As I remember, Mr. Amburgey and Mr. Rowe and myself.

Q - This occurred in your office, did it not?

A - Yes, sir.

Q - From what did you base your idea of the price you wanted to pay?

A - I had a copy of the contract made between the Keokee Coal & Coke Co. and Johnston & Grommet Bros. which states the price that Johnston & Grommet Bros. were to receive for the same kind of work on the Black Mt. Ry. and Keokee spur: I had also been talking with Mr. Bullitt and had received instructions from him as to how much was to be paid for the work, which was to be the same as that allowed Johnston & Grommet Bros.

Q - Did you not likewise have an account or memoranda book of some kind in which statement of these prices were contained?

A - I had no memoranda book; no, sir.

Q - Did you have an account book, journal or ledger or anything of that kind in which they were contained?

A - No, sir.

Q - How did the question arise as to the difference between 100 ft. square and 100 square feet in this conversation?

A - As I remember in the conversation I mentioned the subject several times and in mentioning had made the mistake; that is, confused the terms "100 feet square and 100 square feet", and my attention was called to it by Mr. Amburgey who stated that there was considerable difference between the two areas.

Q - What did you do or say that your attention was called to it by Mr. Amburgey; that is, to the difference?

A - I do not remember exactly what I did say, but probably corrected myself, as my understanding was during the whole conversation that the area was to be 100 feet square.

Q - To refresh your recollection, did you not refer to some memoranda book or something to determine which you did mean?

A - No, sir; I had no memoranda of any kind.

Q - At that time you had, I understand, paid but little attention or no attention to right of way work and had no personal knowledge of proper charges for this clearing?

A - I had knowledge from studying over the contract copy of which was in my desk for work on the Black Mt. Railroad. I was also with Mr. Bullitt a great deal during the work and from conversation with him I had understood about what was a proper price for the work.

Q - Had you prior to this time done any railroad work or been engineer of any railroad construction work.

A - I had no railroad experience; that is railroad lines. I had some experience on trolley lines and sidings similar to the one put in at Keokee.

Q - Had you prior to that time paid any attention t the exact width of the right of way for the Black Mountain Railroad?

A - I had seen a map in Mr. Bullitt's office of the proposed line, which showed right of way lines on it. In general terms the right of way is 100 ft.; sometimes it is more and sometimes less.

Q - Is it not frequently less in mountainous countries?

A - Not so far as I know.

Q - As a matter of fact did you know whether or not the right of way in this section had been definitely agreed upon as to width and a great many other questions between your company and Interstate Investment Company on your part and Black Mountain Ry. Co. on the other part?

A - I do not think the Interstate Investment Company enter into but a very small piece of the land as only a part of the

Black Mt. Ry. line was through their property. I do know that there were several stations 100 ft. wide.

Q - This right of way in controversy here was on land leased by your company from the Interstate Investment Company, was it not?

A - It was on a piece which had been traded between the Keokee Coal & Coke Company and Interstate Investment Company with the school and church officials; and also a part of the Legg land which was leased by the Keokee Company.

Q - How long after the conversation between you and Messrs. Rowe & Amburgey before you dictated the letter you file as an exhibit with your deposition?

A - I am not positive just how long it was.

Q - Give your best recollection.

A - I should say it would be the same evening or the next day.

Q - How long after it was dictated, as nearly as you can recollect, before it was presented to you for your signature?

A - If it was dictated the night before, it was presented the next day.

Q - Did you or not read it over before you signed it?

A - I certainly did not or I would not have left it go out as it was.

Q - You do not recall, as I understand you, whether the alleged error was yours or the stenographer?

A - No, sir.

Q - Are you in the habit of signing contracts without reading them?

A - Not as a habit; no sir.

Q - Do you know of your own knowledge when the letter or contract was delivered to Messrs. Amburgey & Rowe?

A - I do not know exactly; it was given to my stenographer to hand to them.

Q - You have stated that they began work before receiving this letter; is not your answer to this based on hearsay rather than on your own knowledge?

A - No, sir.

Q - You do not know of your own knowledge about it?

A - My remembrance was that the work was started and after that they came for the contract. I think they started to work the day after the conversation in my office.

Q - Do you know exactly when they did start to work?

A - No, sir, I do not remember the dates.

Q - Do you know exactly when the letter was handed to them?

A - Not exactly, no, sir.

Q - By whom was it given?

A - It was given by my stenographer.

Q - Then how do you know that they started to work before the letter was handed to them?

A - I am practically certain that the letter did not reach them for three or four days after the contract was signed.

Q - Is this not based on information given you by your stenographer rather than by your own knowledge?

A - No, sir; my stenographer has left.

Q - If you do not know when they started to work and do not know when the letter was given to them, how do you know that they started to work before the letter was given to them?

A - I have a pretty good idea of when the letter was handed them and I know about when they started to work.

Q - Upon what do you base this idea?

A - Upon my remembrance.

Q - How can you remember if you did not hand them the letter and do not know that your stenographer handed it to them?

A - I said above that I knew about when it was handed to them.

Q - Upon what do you base your opinion as to about when it was handed to them?

A - As I remember.

Q - Then as a matter of fact you cannot state with absolute positiveness, upon your own individual knowledge, which of these things took place first, can you?

A - My own individual knowledge is the only thing I have to rely on about it. As I said before, I remember the whole thing, that they started before they received the contract.

Q - But you are not prepared to state this as an absolute fact, if you base it upon your own knowledge?

A - Yes, sir; based upon my own knowledge.

Q - Is this not a matter of opinion rather than a matter of fact absolutely known by you?

A - I could not state the dates when the contract was handed or the date when they started work, but I am sure in my own mind that they started to work before they received the contract.

Q - That is your opinion?

A - Yes, sir.

Q - Did you after this verbal conversation have anything to say with Messrs. Amburgey& Rowe about the work?

A - I probably went down and saw the work where they were doing the clearing and I did visit the work while they were on it, but I do not remember any conversation regarding terms, etc. until later on.

Q - The work was accepted by you for the company, was it not?

A - Yes, sir.

Q - Do you remember how many ties and mine props were made for this section of the right of way?

A - I do not.

Q - Do you remember the amount that was offered to Amburgey & Rowe at the first time a tender was made to them for the work?

A - Do not.

Q - Do you remember whether there were any errors for this amount and you subsequently offered them a larger amount?

A - I do not remember of any error, no, sir. If there were any it might have been in the matter of figuring or something of the sort in the number of ties, but I do not remember of any error. There was no amount offered except what was called for in the contract.

Q - As a matter of fact, you know nothing of your knowledge about what amount or how much was tendered them in payment for the work, do you?

A - Payment might have been made if they finished part of the work on the first of the month, that is, partial payment might have been made them, but if a final payment was made them it was probably something over $500.00.

Q - Do you know anything about this of your own knowledge; the amount that was offered?

A - We find them outstanding on their credit on the books about $500.00.

Q - You know this from an examination of the books?

A - I know that by the estimates which was signed by me and passed before payment was made.

Q - You do not know of your own knowledge whether money was tendered them by voucher or in cash, do you?

A - I do not, no, sir.

Re-direct examination

By Mr. Irvine -

Q - Mr. Judd, is $500.00 right or $50.00?

A - Mr. Irvine, I do not know what the exact amount is. Whatever amount was offered them in the first place is still there.

Q - Will you please get a statement from your books as soon as you return to Keokee and mail to the Notary, showing the statement on your books of this account, and file it marked "Exhibit No. 2" to your deposition?

A - Yes, sir.

Objection by Mr. Chalkley.

This method of filing exhibit is objected to because it does not give the defendants an opportunity to cross-examine on the point.

And further this deponent sayeth not.

By agreement of counsel, signature waived.

Also the deposition of Charles Johnson, who being first duly sworn, deposes as follows:

By Mr. Irvine:

Q - Please state your age, occupation and place of residence?

A - I am a stone-mason by occupation; 45 yrs. old; residence, Big Stone Gap, Va.

Q - Did you do any work as a sub-contractor on the line of road from Imboden to Keokee for the Black Mt. Ry. Co.?

A - I have done some work for the Keokee Coal & Coke Co.

Q - They had the contract, had they not, for constructing

 that road?

A - I had a contract from them for culverts, that is building culverts and excavations. I also had a verbal contract for clearing; the other was written.

Q - State what your verbal contract for clearing was?

Objection by Mr. Chalkley -

Objected to because irrelevant and immaterial.

A - I was to clear it at $6.00 a station; every 100 ft. square; that is 100 lineal feet to the right of way, the most of it is 100 feet wide, so you may say for every 100 ft. would be a station.

Q - State whether or not that was a fair price for that work?

Objection by Mr. Chalkley -

Objected to because immaterial and irrelevant.

A - Yes, sir.

Q - State whether or not you made any money on your contract at that price?

Objection by Mr. Chalkley -

Objected to because immaterial and irrelevant.

A - Yes, I paid my men and made some money.

Q - State whether or not the work that you did was as difficult clearing as the average of that line?

A - Objected to by Mr. Chalkley -

Question objected to for the same reason as above.

A - It was said by the men who had done the other clearing, and part of it had been done when I got there, that it was the heaviest piece left on the road.

Objected to by Mr. Chalkley -

Answer likewise objected to, because hearsay.

Q - Did you see the line of right of way from the Keokee Junction up to the Keokee coke ovens?

A - Yes, sir.

Q - State how the clearing that you did on the main line was as compared with that clearing that had to be done on the branch line?

Objected to by Mr. Chalkley -
Objected to because irrelevant and immaterial.

A - Mine had a great deal heavier work on.

And further this deponent sayeth not.

By agreement of counsel, signature waived.

No witnesses appearing, the taking of these depositions is continued until to-morrow, at the same place and between the same hours mentioned in the caption.

25-

September 2, 1908.

James E. Mears.
Notary Public for Wise County, Virginia.

Big Stone Gap, Virginia, September 3, 1908.

Met, pursuant to adjournment on yesterday.

A. X. Morison, Counsel for Plaintiff;

_____ Counsel for Defendant.

Mr. R. Hornick, a witness of lawful age, being first duly sworn, deposes and says:

By Mr. Morison -

Q - Mr. Hornick are you familiar with the territory through which the line of the Black Mt. Ry. extends?

A - I am slightly acquainted with it.

Q - Are you familiar with the prevailing prices for clearing off right of way, not grubbing?

A - I know what prices are and what is usually paid, which is usually $12.00 per acre. There is more clearing done at $12.00 an acre than any other price.

Q - What is the usual method of letting to contract, clearing of a right of way?

A - It is generally done by the acre, but we sum it at so much a hundred feet.

Q - What does a station mean in railroad language?

A - A station is 100 feet.

Q - What is the prevailing price for clearing per station?

A - The right of way will average 100 ft. and it will be from $3.00 to $5.00, but occasionally it gets for a short

distance that the right of way is worth more than that, but it is not continuous.

Q - What would be a fair price for clearing along the Black Mt. Ry. Company's line, as you know it, per station?

A - $6.00.

Q - Have you ever been over the spur track of the Black Mt. Ry. Co. from the Keokee Junction to the coke ovens?

A - Yes, sir.

Q - What would be a fair price per station for clearing on this spur track?

A - Between $5.00 and $6.00 would be considered a very big price.

Q - Would $6.00 per one hundred square feet be a reasonable or unreasonable price?

A - It would be most unreasonable. It was never heard of since I have been born.

And further this deponent sayeth not.

By agreement of counsel, signature is waived.

27- Plaintiffs, by E. J. Filoon, their attorney, object to each and every question, and the answers thereto, asked witnesses J. W. Johnston, J. S. Dunn and H. Hornick because they are immaterial and irrelevant.

Virginia, Wise county, to-wit:

I, James E. Mears, a notary public in and for the county aforesaid, in the State of Virginia, do hereby certify that the foregoing depositions of J. W. Johnston, J. S. Dunn, H. L. Judd, Charles Johnson and H. Hornick were taken and sworn to before me at the times and place and for the purposes in the caption mentioned.

Given under my hand this 3d day of September, 1900.

James E. Mears,
Notary Public, Wise county,
Virginia.

COSTS:

Notary Public:

Typing in shorthand and transcribing,
7½ hours @ 75¢ $5.62

Witnesses:

J. E. Dunn, 1 day,	50¢	
Charles Johnson, 1 day,	50¢	
C. Dornick, 1 day,	50¢	
T. K. Johnston, 1 day,	50¢	
L. F. Judd, 1 day,	50¢	
Total,		$2.50
		$8.12

None of the above fees have been paid, with the exception of C. Dornick.

Hooker Coal & Coke Co.
v. } Depositions of
W. C. Judd, et al,
Ambrugy & Rowe

Received by mail in
good condition and
filed Sept. 8th, 1908.
T. C. P. Ewing,
Clerk.

IRVINE & MORISON
ATTORNEYS AT LAW
BIG STONE GAP, VA.

Keokee Coal & Coke Company
v.
Amburgey & Rowe.

EXHIBIT #2 to deposition of H. E. JUDD -

AMBURGY & ROWE'S a/c as it appears on
our June, '07, payroll:

(Sta. 2 00 to 18 00) 64000 Sq. ft. @ $6.00 per 10000 sq. ft.		$38.40
(Sta. 18 75 to 19 00) 1000 Sq. ft. @ $6.00 per 10000 sq. ft.		$ .60
Branch connections at Ovens 23925 Sq. ft. @ $6.00 per 10000 sq. ft.		14.35
35 Motor ties	@ .07-1/2	2.62
66 Entry "	@ .05	3.30
45 R.R. "	@ .20	9.00
124 ft. Props	@ 1/2¢ per ft.	.62
		$68.89

THIS CONTRACT AND AGREEMENT, Made and entered into this twentieth day of December A. D. 1906, between The Keokee Coal and Coke Company, a corporation duly organized under the laws of the State of New York, party of the first part, and F. W. Johnston, G. J. Grommet and W. J. Grommet, composing the firm of Johnston and Grommet Brothers, of Alton, Illinois, parties of the second part, hereinafter called the "Contractors".

WHEREAS, The Keokee Coal and Coke Company are now constructing the Black Mountain Division of the Virginia and Southwestern Railway from Imboden to Keokee, Virginia, comprising Miles thirteen (13) to seventeen (17), inclusive, and its own line from connection with Black Mountain Division to its Coke Ovens at Keokee, Virginia.

WHEREAS, Contractors in consideration of the prices hereinafter agreed to be paid to them by The Keokee Coal and Coke Company, hereby undertakes and agrees to do and perform to the satisfaction and acceptance of the Chief Engineer of the Black Mountain Division of the Virginia and Southwestern Railway Company, all the clearing, grubbing, grading and bridging, and to do and supply all other things requisite and necessary to complete said road-bed and to prepare the same ready to receive superstructure and lay skeleton track.

Said work to be finished in the best and most workmanlike manner, and to be constructed as shown by map of definite location of said railway, made under the directions of the Chief Engineer of the Virginia and Southwestern Railway Company, and in accordance with the specifications hereto annexed, and plans furnished hereafter and made a part hereof.

WHEN BEGUN AND FINISHED.

2. The work shall be begun immediately upon the execution of this Contract, and shall be prosecuted vigorously and continuously and completed on or before the first day of May , 1907, time being the essence of this Contract.

NO DAMAGE FOR DELAY IN PROCURING RIGHT OF WAY.

Should delay be occasioned by failure on the part of Company to procure all necessary right of way or furnish necessary material, The Keokee Coal and Coke Company shall not be liable for damage on account thereof, but an extension of time shall be granted the Contractors for the completion of the contract. The additional time to be allowed shall be determined by the Chief Engineer of The Keokee Coal and Coke Company.

WORK TAKEN ON CONTRACTORS' JUDGMENT.

3. Contractors take the work solely upon their own information and judgment of the character of the country and location and the amount of the various kinds of material to be encountered, and without reliance upon the profiles and preliminary approximate estimates of the Chief Engineer of the Railway Company or the Keokee Coal and Coke Company.

PROPOSAL AND SPECIFICATION PART OF CONTRACT.

4. The accepted tender of the Contractors, the specifications for the doing of the work, and the several parts of this contract shall be taken and construed together; and if it be found that anything has been omitted or misstated, which is necessary for the proper performance and completion of any part of the work contracted for, Contractors will, at their own expense, execute the same as if it had been inserted or properly described herein, as the case may be, and the decision of the Chief Engineer of the Keokee Coal and Coke Company shall be final as to any such error or omission, and the correction of any such error or omission shall not be deemed to be an addition to or deviation from the work herein contracted for.

CHIEF ENGINEER MAY ORDER ADDITIONAL WORK OR CHANGES WITHOUT AFFECTING PRICES.

5. The Chief Engineer of the Railway Company shall be at liberty at any time, either before or during the construction of the work, or any portion thereof, to order any additional work to be done, and to make changes in the work contracted for or in its location or position, either in line or grade which he may deem expedient, whether such changes increase or diminish the work to be done, or the cost of doing the same.

All the terms and provisions of this contract shall apply to all such changes, additions or deviations in like manner and to the same extent as the work originally contracted for, and no changes, additions or the deviations shall annul or invalidate this Contract. Such changes, additions or de-

viations shall not affect the prices herein specified; nor shall any bill for "Extras" or other charge or claim, under any consideration be made, allowed or paid by reason thereof, or any difference occasioned by any such damage or alteration in the quality, quantity or location or nature of the work to be performed.

WORK NOT COVERED TO BE PERFORMED AT PRICES TO BE FIXED BY CHIEF ENGINEER.

6. Whenever work is required to be done which is not covered at the prices herein mentioned, the Chief Engineer of The Keokee Coal and Coke Company shall give a written order for the doing of the work, which shall be paid for at cost plus ten (10%) per cent. The obtaining of the certificate of the Chief Engineer of the Keokee Coal and Coke Company as to the work done shall be a condition precedent to the right of Contractors to be paid for by any such extra work.

CLAIMS FOR EXTRA WORK.

All claims for extra work or material which has been ordered in writing by the Chief Engineer of the Keokee Coal and Coke Company must be presented to the Chief Engineer of said Company for allowance at close of the month in which it was done or furnished, to be included in the estimate for the month; otherwise, all claims therefor shall be absolutely waived by the Contractors and Company shall not be required to allow or pay the same.

THE WORK TO BE WHERE DIRECTED.

7. Contractors will carry on and prosecute the work in such manner, at such time and at such places or points as the Chief Engineer of the Keokee Coal and Coke Company shall direct, and will complete and prepare for the superstructure any portions of the work that may be required by the Chief Engineer of the Keokee Coal and Coke Company.

POSSESSION BY THE COMPANY.

Company shall have right to take possession of any such completed portion of the work, for the purpose of laying track and operating, notwithstanding that the time for completion of the entire work may not be expired, and such taking possession shall not be deemed an acceptance of the work or part thereof.

PERSONAL SUPERVISION BY CONTRACTORS.

8. The work shall be performed under the personal supervision of Contractors, and this contract shall not be assigned nor shall any portion of the work be sub-contracted without the written consent of the Chief Engineer of the Keokee Coal and Coke Company.

FORM OF SUB-CONTRACTS.

All sub-contracts shall be written on forms identical in terms and provisions with this Contract.

SUB-CONTRACT NOT A RELEASE.

The Contractors shall remain responsible to the Company for the proper performance and completion of the work, notwithstanding that any such sub-contracts may exist.

DISMISSAL OF EMPLOYEES FOR CAUSE.

9. Any person in employ of Contractors, or of any sub-contractors, who in the opinion of the Chief Engineers of the

two Companies, shall not perform his work in a proper manner,or shall be riotous, disrespectful, intemperate, disorderly or otherwise troublesome shall,at the written request of the Chief Engineers be forthwith discharged by the Contractors and shall not again be employed on any portion of the work.

CONTRACTORS RESPONSIBLE FOR DAMAGES,ETC.

10. Contractors shall be responsible and liable for all damages of every nature whatsoever done to persons or property during the performance of the work, and occasioned by his own act or neglect, or that of any of their sub-contractors,foremen or other employees or agents. The Keokee Coal and Coke Company will not be responsible for any damages occasioned to any person or to the public. Such damages shall be paid on certificate of Chief Engineers of Companies. If, however, Companies shall be held responsible for any such damages either to individuals or to the public,then, in such event, Contractors shall indemnify Companies against all such damages including cost and expense of defense; and the Contractors will at their own proper cost and expense,make and maintain such temporary provisions as may be necessary by way of fences or otherwise, for the protection of persons and property during the performance of said work. It being distinctly understood that the Contractors shall not be liable for any damages resulting from the operation of trains upon said work.

CLAIMS DEDUCTED BY COMPANY.

Should there be any unsatisfactory claims or damages to persons or property at the time the final estimate for the doing of the work is made,and returned, the Chief Engineer of the Keokee Coal and Coke Company shall have the right to estimate and finally determine the amount of such damage, and to pay the same to the proper parties,and all such sums so estimated and paid shall be deducted from the amount due the Contractors as shown by the final estimate.

Contractors shall respect, adhere to and comply with all ordinances and laws controlling or directing in any way, the actions of those engaged upon the work, or affecting the materials or transportation or disposition of them,and shall be liable for any failure to do so as indicated in the two preceding paragraphs of this section.

ROADS, ETC. PROVIDED BY CONTRACTORS.

11. All roads for hauling material, and ways to and from the work together with all grounds for the deposit of materials and the erection of camps or shanties,or yards for the performance of the work,not within the limits of Company's lands,shall be provided by Contractors at their own proper cost and expense.

DAMAGE TO WORK AT CONTRACTORS' RISK.

12. Contractors shall be at the risk of and shall bear all loss or damage which may occur to the work or any part thereof,for any cause whatsoever until the same be fully and finally completd and delivered to and accepted by the Railway Company;and,if any loss or damage occur before such final completion,deliverance and acceptance,the Contractors shall immediately repair and restore at their own expense the work so damaged,so that the whole work,and each and every part thereof,may be completed within the time herein mentioned,and may be in good order and condition at the time the same is presented for acceptance.

IMPERFECT WORK, ETC.

13. All imperfect and insufficient work when pointed out by the Chief Engineers of the Companies shall be immediately remedied and made good and sufficient by the Contractors at their own cost and expense,to the satisfaction of said Chief Engineers,

and any omission by the said Chief Engineers to disapprove of or reject any insufficient or imperfect work at the time of any monthly or other estimate, shall not be an acceptance of such work and the said Chief Engineers shall have the power to have any defective work rebuilt or replaced at any time at the expense of the Contractors.

PAYMENTS.

14. The Keokee Coal and Coke Company, in consideration of the faithful performance by the Contractors of all and singular their covenants, promises and agreements herein contained, hereby undertakes and agrees to pay to the Contractors upon full completion by them of all the work embraced in this contract, in the manner and within the time herein specified and limited for the completion thereof, and to the satisfaction, approval and acceptance in writing of the Chief Engineer of the Railway Company, the following schedule of prices to wit:

Clearing Six Dollars ..... $6.00 Per Station }
Grubbing Eight Dollars..... $8.00 Per Station }

Earth Twenty eight cents.....28 cts Per Cu. Yard

Loose Rock Forty eight cents.48.cts Per Cu. Yard

Solid Rock Eighty eight cents 88 cts. Per Cu. Yard

Bridging erected, Material furnished by Company Twelve Dollars.... $12.00 Per M.ft.B.M.

It is further agreed between the Keokee Coal and Coke Company and the Contractors, in addition to the above prices, that the Keokee Coal and Coke Company will pay as a premium Two Hundred ($200.00) Dollars to the Contractors for each day that the work on Miles thirteen (13) to seventeen (17), inclusive, is completed before the first day of May, 1907, and the Contractors will forfeit to the Keokee Coal and Coke Company Two Hundred ($200.00) Dollars for each day the work on Miles thirteen (13) to seventeen (17), inclusive, ~~is completed before the first day of May, 1907, and the contractors will forfeit to the Keokee Coal and Coke Company Two Hundred ($200.00) Dollars for each day the work on Miles thirteen (13) to seventeen (17) inclusive~~, is unfinished after the first day of May, 1907. It is further agreed by the Keokee Coal and Coke Company to take off of the Contractors hands all lumber used in the construction of camps, after work is completed, at 50% of the cost of lumber to Contractors at the mills.

It is also agreed by the Keokee Coal and Coke Company to pay to the Contractors one-half (1/2) of the cost of transportation on the first two hundred and fifty (250) laborers shipped to the work, if they are on the work by the first of February, 1907, and receipts for such transportation from Railroad Companies must be furnished by the Contractors.

Contractors shall have free transportation for men, tools and material and supplies in the construction of the line on all work trains, over new line of the Black Mountain Division from Appalachia, Virginia, to the Front, and free transportation on labor over the Virginia and Southwestern Railway from Bristol, Tennessee, to Appalachia, Virginia, to the first day of January, 1907.

The Keokee Coal and Coke Company will furnish to Contractors such light steel as may be necessary for their use in doing the grading; the Contractors agreeing to lay sufficient ties under this steel to protect it from kinking and being ruined for future use, and on completion of work to take up and pile at such points as designated by the Chief Engineer of the Keokee Coal and Coke Company, that it may be conveniently loaded.

MONTHLY ESTIMATES.

15. Approximate estimates of the work done under this Contract are to be made at the end of each calendar month by the Chief Engineer of the Railway Company, and payments thereon are to be made by the Keokee Coal and Coke Company, based on these estimates, to Contractors on or about the fifteenth (15th) day of the next ensuing month, less all previous payments and less ten per cent. of the amount of each and every monthly estimate, which percentage shall be retained by the Company until the complete performance of this work by the Contractors.

MONTHLY ESTIMATES NOT AN ACCEPTANCE OF WORK.

The approximate estimate made from month to month, shall not, in any respect, be taken as an admission by the Keokee Coal and Coke Company of the work done or of its quality or sufficiency, or of the amount due to Contractors, nor as an acceptance of the work or release of Contractors from the responsibility in respect thereof; but at the time of the making of the final estimate, the whole of the work and all of the particulars relating thereto, including quantity, quality and price shall be subject to revision and adjustment by the Chief Engineer of the Keokee Coal & Coke Co.

COMPANY NOT LIABLE FOR ERRORS.

The Keokee Coal and Coke Company shall not be liable for any errors or omissions in said approximate monthly estimates, nor for any loss or damage suffered by Contractors by reason of their having settled with their sub-contractors on the faith thereof, or otherwise.

SUSPENSION OF WORK.

The Keokee Coal and Coke Company shall have the right on ten (10) days written notice, to suspend operation or to reduce the working force from time to time, to any particular point or points, or upon the whole work; and in the event of such rights being exercised so as to cause any delay to Contractors, then an extension of time equal to such delay, to be fixed by Chief Engineer of the Keokee Coal and Coke Company, shall be allowed the Contractors to complete the contract; but, no such delay shall vitiate or void this contract or any part thereof, or any bond given to secure the performance of the same; nor, shall the Contractors be entitled to any damages by reason of any such suspension or reduction of the force.

RESUMPTION OF WORK.

At any time after operations have been suspended, either in whole or in part, such operations may again be resumed as Chief Engineer of the Keokee Coal and Coke Company may think proper; and upon receipt of written notice from the Chief Engineer of the Keokee Coal and Coke Company that the suspended operations are to be resumed, the Contractors shall, within three (3) days resume work upon the contract and diligently carry on the same.

CORRECTING IMPERFECTIONS.

16. If the Chief Engineer of The Keokee Coal and Coke Company shall, at any time, be of the opinion that Contractors are neglecting to remedy any imperfections in the work, or are not progressing with the work as fast as necessary, or have not sufficient force employed to ensure its completion within the time and the manner herein required, or are otherwise violating any of the provisions of this contract, said Chief Engineer of The Keokee Coal and Coke Company, in behalf of Company, shall have the power and it shall be his duty to order and direct the Contractors to remedy such imperfections, proceed rapidly with the work, increase his forces or otherwise comply with provisions of this contract within ten (10) days after service of notice, or within such additional time as may be named therein, and upon the failure or refusal of Contractors to comply with such orders and directions, said Chief Engineer of The Keokee Coal and Coke Company shall have the power and authority on behalf of Company, and it shall be his duty to declare this contract forfeited and abandoned by Contractors, and said contract shall thereupon cease and terminate; and, in such case, the amount of money which may then remain unpaid and would otherwise be payable to Contractors under this contract, including the percentage retained on all monthly estimates, shall be kept retained and appropriated by Company in its own right absolutely, and Contractors shall have no claim to said money or any part thereof.

The Contractors shall promptly relinquish possession of the work upon the happening of the contingency herein named; and, upon their refusal to do so, The Keokee Coal and Coke Company shall have the right to remove them therefrom, using such force as may be deemed necessary for the purpose.

COMPANY TO DO WORK AND
CHARGE CONTRACTORS.

17. The Keokee Coal and Coke Company shall have the right to employ such force and means as in the judgment of the Chief Engineer of Company shall be necessary to complete the work in the manner and within the time provided for this contract, and the cost and expenses thereof, shall be paid by Contractors, and Company may use in the doing of the work, not only the horses and mules, machinery and materials provided on behalf of Company, but also, such as may have been or may be providdd by or on behalf of Contractors.

CANCELLING CONTRACT.

18. The Keokee Coal and Coke Company shall have the right at any time to stop the work hereby contracted for and to put an end to this contract, upon giving ten (10) days written notice to Contractors of its intention to do so.

The Contractors, however, will in such event, be entitled to receive full compensation for all work then actually done by them under the contract at the prices herein stipulated; and, at the same time, upon the same condition and upon the same final estimate of the Chief Engineer of the Railway Company, except as to amount as if the entire work had been completed.

Such estimate shall not include any allowance to Contractors for any anticipated profits that might have accrued upon the completion of the work, and Contractors will assert no claims for damages against the Keokee Coal and Coke Company or Railway Company on account thereof.

NOTICES, HOW SERVED.

19. Any notice to be given by the Keokee Coal and Coke Company to the Contractors under this contract, shall be deemed to be properly served or if the same be left at any office used by the Contractors, or their foreman or agent, at or near the work, or delivered to any of their foremen upon the work or deposited in the Post office postpaid, addressed to the Contractors, at their last place of business.

PAYMENTS OF SUB-CONTRACTORS.

20. Contractors shall properly pay all sub-contractors, material, men, laborers and other employees, as often as payment is made by The Keokee Coal and Coke Company, and in the event of their failure at any time to do so, Company may retain from all subsequent estimates and pay over to said sub-contractors, material, men, laborers and other employees such sums as may, from time to time, be due to them respectively.

LIENS.

Before final settlement is made between the parties hereto for work done and material furnished under this contract, and before any right of action shall accrue to Contractors against The Keokee Coal and Coke Company therefor, said Contractors shall furnish evidence satisfactory to the Chief Engineer of said Company, that the work covered by the contract is free and clear from all liens for all labor or material; and that no claim then exists against the same for which any liens could be enforced.

FINAL ESTIMATE.

21. Whenever, in the opinion of the Chief Engineer of The Keokee Coal and Coke Company, this contract and all things herein agreed to be done by Contractors, shall have been completely performed and finished according to the provisions thereof, and within the limited time said Chief Engineer of the Railway Company shall make and return a final estimate of the work done by Contractors under this contract, and shall certify the same in writing under his hand, The Keokee Coal and Coke Company shall within thirty (30) days after the completion of the work aforesaid, and the return of said final estimate, pay to the Contractors the full amount so far to be due them and remaining unpaid, including the percentage retained in former estimates as aforesaid, except as in this contract is otherwise provided.

The procuring of such certificate and final estimate shall constitute a condition precedent to any right of action by Contractors against the Keokee Coal and Coke Company.

RELEASE.

Before final payment shall be required to be made by The Keokee Coal and Coke Company under this contract, the Contractors shall acknowledge and deliver under their hands and seals, a release and discharge of and from any and all claims and demands for and in respect of all matters and things growing out of or connected with this contract or the subject matters thereof, and of or from all claims or demands whatsoever.

CHIEF ENGINEER APPOINTED UMPIRE.

22. It is hereby mutually covenanted and agreed by and between the said parties hereto, that to prevent disputes and misunderstandings between them in relation to any of these stipulations

and pro-
visions contained in this agreement, or to the true intent or meaning thereof, and of the specifications hereto annexed, and of the plans profiles and drawings relating thereto, or in the manner or performance of said contract by either of said parties and for the speedy settlement of all such as may occur; the Chief Engineer of the Railway Company who may be such at the time of the making of the final estimate, shall be, and he is hereby made, constituted and appointed the umpire to finally decide all such questions and matters; and he shall also determine and set forth in the final estimate, the amount and quantity of all work and material performed and furnished by Contractors under this contract, and his decision as to any and all such questions, matters and things, and in construing any of the terms and provisions of this contract, shall have the force and effect of an award and shall be final, binding and conclusive to all intents and purposes and in all places upon the said parties hereto.

ASSISTANT ENGINEERS, ETC.,
AND THEIR POWERS.

And the Chief Engineer of the Railway Company who may be such at any time during the performance of this contract, is hereby expressly authorized by said Company to appoint all necessary Assistant, Division and Resident Engineers, and other agents to represent him upon the work and in and about the same, and to vest in them any or all the powers conferred upon him herein or in the annexed specifications, and all directions given by the Assistant Engineers, Inspectors or other persons appointed by this contract, must be as fully and explicitly carried out as if directed by the Chief Engineer personally.

Said Chief Engineer of the Railway Company may take final action as umpire upon any and all questions, matters and things arising under this contract upon the reports and statements of said Assistant, Division and Resident Engineers or other agents, and all of his acts in the premises shall be final and conclusive and binding upon the parties to this contract.

23. It is finally covenanted and agreed by and between the parties hereto for themselves, the sub-contractors, executors, administrators, successors and assigns, that this contract in all of its terms and provisions shall be binding upon them, and each and every one of them, and that the work covered by this contract and all the money due thereunder, shall be free from and not liable to any liens or charges at law, or in Equity, or under the Mechanic's Lien Law in any State, Territory or County.

And it is further mutually agreed between the parties hereto, that within ten (10) days from the date of this agreement, the Contractors shall execute and deliver to the Company a good and sufficient Surety Bond of Five Thousand ($5,000.) Dollars or such security as may be acceptable to the President of The Keokee Coal and Coke Company, said bond to be conditional for the faithful performance of the contract and all the covenants and provisions thereof.

IN WITNESS WHEREOF, the parties of the first part have caused this agreement to be executed by its President, and the parties of the second part have hereunto subscribed their names the day and year first above written.

A. N. Bullitt
Chief Eng.

Keokee Coal & Coke Company
By C. P. Perin
President.

Johnston and Grommet Bros.
By G. J. Grommet.

Exhibit #1 to N. E. Judd's deposition
(Keokee Coal & Coke Company
vs
Armbursey & Rowe.

Railway Contract

Received by mail in good condition and filed Sept. 8th, 1908.

H. C. Ewing
Clerk.

IRVINE & MORISON
ATTORNEYS AT LAW
BIG STONE GAP, VA.

Keokee Coal & Coke Company, Pltff.
v.
Ambuyer & Rowe, Dfts.
} Exhibits to deposition of N. E. Judd.

To the Clerk of the Circuit Court of Lee County, Virginia,
Jonesville
Virginia.

VINE & MORISON
ATTORNEYS AT LAW
BIG STONE GAP, VA.

Kokee Coal & Coke Company, Pltff.
v.
Ambrogy & Lowe, Dfts.
} Depositions of H.E. Judd et als.

To the Clerk of the Circuit Court
of Lee County, Virginia,
Jonesville,
Virginia